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APR 22 1941
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# Supreme Court of the United States

OCTOBER TERM, 1940

No. 896

WILLIAM CAMPBELL,

*Petitioner (Plaintiff),*

*against*

AMERICAN FOREIGN STEAMSHIP CORPORATION,

*Respondent (Defendant).*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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### Opinion Below

There is no opinion of the United States District Court for the Southern District of New York, except the memorandum decision at page 312 of the Record, reducing the jury's verdict for maintenance and cure. The opinion of the Circuit Court of Appeals is recorded in 116 Fed. (2d) 926.

### Jurisdiction

The judgment of the Circuit Court of Appeals for the Second Circuit was entered on February 10th, 1941. The

jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, Title 28, as amended by the Act of February 13th, 1925.

## The Question Involved

Petitioner's statement, purporting to set forth a "Summary and short statement of the matters involved" and asserting that there are four "Questions raised by the case" seems to miss the whole point in the case. The question should have been stated as follows:

> May a seaman be permitted to collect $2.50 per day maintenance and cure from his former employer for a period of three years without adducing medical testimony definitely indicating the need for treatment for so long a period, when receiving $40.00 per week wages from independent employment?

It should be borne in mind that the trial court's lump sum allowance of $3,041.50 for maintenance and cure until April, 1943 (a three-year period), was ostensibly to provide the petitioner with maintenance while he was being rehabilitated under the belief that the petitioner was unable to work and could not, therefore, provide food and lodging for himself during such a period. In this connection there was an absence of medical testimony definitely indicating the need of treatment or the reasonableness of any period.

## Statement

The petitioner, William Campbell, a messman on the S/S "Wildwood" on March 19th, 1939, slipped on the deck of the vessel while carrying two plates of fish and struck his head and back on the said deck (R., fols. 426-428). De-

spite the alleged injury, he continued to work for approximately fifteen days until the completion of the said voyage (R., fols. 434-435). It was not until April 4th, 1939, that the petitioner sought hospitalization at the United States Marine Hospital at Hudson and Jay Streets, New York City, from whence he was sent to the United States Marine Hospital at Stapleton, Staten Island (R., fols. 79-81). Subsequent to his discharge from the Stapleton Hospital he stayed home for a period of four weeks and then returned to the Stapleton Marine Hospital, where he remained until his discharge in the latter part of November, 1939. During his last stay at the hospital he was treated for a cough.

While at the Stapleton Hospital he twice contracted pneumonia (R., fols. 213-219). It was during the time that he was ill with pneumonia that the alleged neurological symptoms manifested themselves in alleged "change of personality." The aforesaid hospitalization was without cost to the petitioner.

Although the petitioner held himself out immediately after the trial in February, 1940, as being able to fulfill a patrolman's duties with the National Maritime Union and did go to work on July 1st, 1940 (Supp. R., fols. 24-40), he produced two doctors who testified concerning his physical condition.

Dr. Kelman treated the petitioner in the United States Marine Hospital at Stapleton. He testified that one of the petitioner's ailments while confined to the hospital was pneumonia, during which period he suffered from toxic poisoning, became delirious and had hallucinations (R., fol. 213 *et seq.*). Dr. Kelman attempted to show that "change of personality" on the part of this former mess-

man was part of the alleged ailment (R., fol. 308). However, his testimony was indefinite, uncertain, vague and he equivocated when any question was put to him directly, *i. e.*:

> "Q. As a result of your treatment of similar cases in the past, what is your opinion as to the treatment that this patient requires? A. As I indicated before, when I sent him out the first time I hoped that he would make the grade that time. Well, he did not make it, so I brought him back in. It may be necessary to bring him back in several times. This I cannot determine. One cannot say with absolute certainty, except from similar cases to the way this case has gone, what the likelihood is. He may have to come back several times more, and how the thing will turn out we cannot absolutely say" (R., fols. 242-243).

The second physician who testified, Dr. Perkins, also admitted an inability to estimate the length of time medical treatment would be required, saying:

> "* * * length of time is always problematical, whether that would be months, a few years, many years, or whether further mental study would develop something, that is something I cannot answer." (R., fol. 323).

Equally vague and indefinite and uncertain is the testimony with respect to the reasonableness of any treatment.

Dr. Chaney, who examined the petitioner a short time before the trial, expressed the opinion that the plaintiff was able to go to work (R., fols. 728, 761).

Affidavits of affiants Mendler and Ciampi in the supplemental record indicate the hollowness of all of the testimony concerning the alleged disability from which the peti-

tioner suffered. Rather than being disabled and requiring maintenance and cure for five years as the jury found, or three years as the trial court directed, the petitioner was capable of conducting a campaign for election and assuming a responsible position paying a sum in excess of that which he made prior to the accident (Supp. R., fols. 24-40; 69-70).

Finally, the record is devoid of any testimony to indicate a three-year requirement for maintenance and cure as ordered by the Trial Court.

## Argument

(A.) Petitioner's counsel in her brief has contended that the decision of the Circuit Court of Appeals was erroneous and the petitioner is thereby deprived of his right to maintenance and cure. It is respectfully submitted that this is not the fact. The Circuit Court of Appeals, by its ruling, has, in substance, directed the petitioner to return to the District Court and produce sufficient competent evidence to prove a case.

*Calmar S.S. Corp.* v. *Taylor,* 303 U. S. 525, is authority for the statement that the period of treatment must be definitely ascertainable. That a seaman is entitled to maintenance and cure for a reasonable period of time needs no reiteration.

But it is seriously urged that to compel this or any shipowner-respondent to pay to a seaman-petitioner maintenance and cure in the absence of testimony of probative value and also wherein it affirmatively appears that the said seaman is earning a salary through independent employment during the period for which he seeks main-

tenance and cure, is not only unfair and inequitable but diametrically opposed to the theory upon which the Court in the case of *Reed* v. *Canfield,* Fed. Cas. 11,641 (C. C. Mass.), permitted maintenance and cure. It would be in conflict with all Circuit Court decisions on maintenance.

In this connection it should be borne in mind that the judgment was entered upon a peculiar type of testimony, to wit: a messman, the petitioner, undergoing so marked a "change of personality" as would prevent him from being a seaman and getting along with people.

As to the medical testimony:

Dr. Kelman testified:

> "I would like to follow the man somewhere between two and five years" (R., fol. 243).

Dr. Perkins testified:

> "* * * the length of time is always problematical, whether that would be months, a few years, many years" (R., fol. 323).

Dr. Chaney, respondent's expert, testified to the contrary:

> "Q. That is your conclusion, isn't it, doctor, that the man is perfectly well today, there is nothing the matter with him? A. On the 15th of January. I have not examined him today.
>
> Q. I will reframe the question. The day you examined him he was perfectly well? A. That was my opinion" (R., fol. 761).

Thus, as was stated by the Circuit Court of Appeals, there is no testimony to support the trial court's determination:

> "No physician predicted that the plaintiff would be incapacitated for three years beyond the date of the trial."

May it be said that the jury could find no negligence, but their sympathies were so aroused that they attempted to voice these sympathies by rendering a large maintenance and cure verdict. Their action is without foundation and the action of the trial Judge in fixing a three-year period is equally so.

It is respectfully submitted that to compel the shipowner-respondent herein to pay maintenance and cure for three years on the basis of the record as it presently stands would open wide the doors of our courts to the perpetration of fraud and deceit. It would enable a plaintiff, or petitioner, to wittingly claim injuries, the effects of which are subjective, thereby obtaining from the shipowner a lump-sum award of maintenance and cure for a long period in the future; and as soon as this award is paid, seek and obtain other employment. If the plaintiff-petitioner were permitted, on the basis of this record, to secure $3,158.15 (judgment with costs), it would place a premium on dishonesty and penalize the shipowner.

As a legal proposition, the instant case is identical with *Calmar S.S. Corp.* v. *Taylor,* 303 U. S. 525, wherein the use of maintenance and cure as a means of securing a large lump-sum award in anticipation of a continuing need, was disapproved:

> "The award of a lump sum in anticipation of a continuing need of maintenance and cure for life or an indefinite period, is without support in judicial decision. Awards of small amounts to cover future maintenance and cure of a kind and for a period

> definitely ascertained or ascertainable have occasionally been made (citing cases) * * *" (p. 530).
>
> "The seaman's recovery must therefore be measured in each case by the reasonable cost of that maintenance and cure to which he is entitled at the time of trial, including, in the discretion of the Court, such amounts as may be needful in the immediate future for maintenance and cure of a kind and for a period which can be definitely ascertained." (p. 531).

The action of the Circuit Court of Appeals is in accordance with the law and in keeping with substantial justice and equity. There is no conflict.

(B.) The cases cited by the petitioner are inapplicable to the instant case.

The ruling of the Circuit Court of Appeals is not in conflict with any decision of this Court or any other Circuit Court.

The *Bouker No. 2,* 241 Fed. 831, the *Point Fermin,* 70 Fed. (2d) 602, and *Stevens* v. *R. O'Brien and Co.,* 62 Fed. (2d) 632, cases are not authority for the proposition that a seaman is entitled to maintenance and cure for an indefinite period of time. They merely reiterate the heretofore enunciated rule that maintenance and cure does not terminate with the employment, but must

> "depend upon the facts of each particular case" (*Bouker No. 2, supra,* p. 835).

Equally inapplicable are the cases of *Cunningham* v. *N. Y. C. R. R. Co.,* 49 F. 439, C. C. N. Y. (1892), *Greer* v. *Hendrix,* 69 F. (2d) 404, C. C. A. 7th (1934), and *McConnell* v. *U. S.,* 81 F. (2d) 639, C. C. A. 3rd (1936). These are

actions at law wherein petitioner sought damages for negligence. A reference to the facts indicates that the medical testimony sought therein was definite and certain. The testimony in the instant case is distinguishable for the reason that it is not definite and certain as heretofore pointed out.

Finally, the case of *Smith* v. *Socony Vacuum Oil Co., Inc.*, 96 Fed. (2d) 98, affirmed 305 U. S. 424,* may be distinguished because in the instant case there is no testimony to support the verdict while in that case the Circuit Court distinctly found sufficient facts, although it stated that the plaintiff might have adduced more testimony to good advantage.

(C.) The procedural error.

The opinion of the Circuit Court of Appeals comments upon the respondent's urging that it might take advantage of the error in the unconditional reduction of the verdict and cites *Kennon* v. *Gilmer,* 131 U. S. 22, in which case Mr. Justice GRAY said, at page 30:

> "The defendants were prejudiced, because if the judgment for the lesser sum had been conditional upon a remittitur by the plaintiff, the defendants, if the plaintiff had not remitted, would have had a new trial generally; and if the plaintiff had filed a remittitur, and thereby consented to the judgment, he could not have sued out a writ of error, and the defendants would have been protected from the possibility of being obliged in any event to pay the larger sum."

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* The principal issue involved in the *Smith* v. *Socony Vacuum Oil Co., Inc.*, case, *supra*, is the question of assumption of risk by the plaintiff.

(D.) Petitioner having failed to file the complete record, the certification and filing of the balance of the record has been done by the respondent. A great portion of the opinion treats of the facts contained in the supplemental record and discusses petitioner's independent employment at $40.00 per week subsequent to the trial. The supplemental record is, therefore, placed in the hands of this Court in order that the whole record, upon which the United States Circuit Court of Appeals decided the issues, may be before this Court for consideration.

## Conclusion

The decision of the Circuit Court of Appeals is in accord with both recognized public policy as well as recognized and established authorities; no principle is involved or issue presented which this Court should review or pass upon; nor is there any great public question involved. For these reasons and the reasons set forth in the argument, the petition should be denied.

Respectfully submitted,

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